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No. (1)

IN THE

Supreme Court of the United States

ALFONSO FARQUHARSON,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision in *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856; 166 L. Ed. 2d 856, 75 U.S.L.W. 4078 (2007), which held the requirement of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 72 U.S.L.W. 4546 (2004), that facts (other than prior convictions) necessary to imposing aggravated terms be found by the jury or admitted by the defendant applied to the California determinate sentencing law, is retroactive to the date *Blakely v. Washington* was decided?

2. Whether California's amended determinate sentencing law, adopted after *Cunningham v. California*, which eliminated the presumption of the midterm and gave sentencing judges "discretion" to choose any of the three terms, while not changing anything else, including the sentencing factors, violates the Sixth Amendment to the United States Constitution, as construed in *Cunningham v. California?*

LIST OF ALL PARTIES

Petitioner

ALFONSO FARQUHARSON.

Respondent

PEOPLE OF THE STATE OF CALIFORNIA.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

The California Supreme Court's order and California Court of Appeal's opinion are unpublished. They are attached as an appendix.

BASIS FOR JURISDICTION IN THE SUPREME COURT

1. Date of entry of order sought to be reviewed: February 13, 2008 (order denying state habeas corpus petition).

2. Date of any order respecting rehearing: not applicable.

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury...

Fourteenth Amendment. Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

State Statutes

California Penal Code section 273a:

(a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

California Penal Code section 1170:

(a)(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified... In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports including

reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

former California Penal Code section 1170:

(a)....(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified... In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council.....

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that

justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

California Penal Code section 12022.7

(d) Any person who personally inflicts great bodily injury on a child under the age of five years in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for four, five, or six years.

California Rules of Court

California Rules of Court 4.420. Selection of base term of imprisonment:

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected

unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation

justifying the term selected.

California Rules of Court 4.421. Circumstances in aggravation:
Circumstances in aggravation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime. . . .

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;

. . . (3) The victim was particularly vulnerable;

STATEMENT OF THE CASE

1. Statement of Proceedings

On February 20, 2003, petitioner was sentenced to ten years in prison following a plea of guilty to a charge of California Penal Code section 273a(a), felony child abuse, and an enhancement under California Penal Code section 12022.7(d) for personally inflicting great bodily injury on a child less than five years old. (C.T. 34-37). The court imposed the midterm on the section 273a(a) base charge and the aggravated term on the section 12022.7(d) enhancement under under the determinate sentencing law. The difference between the midterm and aggravated term is one year.

Petitioner filed a timely appeal from his sentence to this

court. This appeal involved issues other than those addressed in this petition. The Court of Appeal filed its opinion affirming petitioner's sentence on April 23, 2004. Petitioner filed a timely petition for review in the California Supreme Court on June 3, 2004. The Supreme Court denied the petition for review on July 14, 2004. The remittitur issued on July 21, 2004.

On June 24, 2004, after the petition for review had been filed, but before the California Supreme Court acted on the petition, this Court decided *Blakely v. Washington*, which, although it specifically found the State of Washington determinate sentencing scheme to be unconstitutional, arguably applied to the State of California's determinate sentencing scheme as well. *Blakely* held that "when a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' ... and the judge exceeds his proper authority" under the Sixth Amendment's guarantee to have all such essential facts found by a jury beyond a reasonable doubt.

On Tuesday, October 12, 2004, petitioner filed a timely Motion to Recall Remittitur within 90 days of the denial of the petition for review, based upon *Blakely v. Washington*. Petitioner argued that the aggravated term was improperly imposed because the aggravating facts were not submitted to a jury for determination beyond a reasonable doubt, as provided in Blakely. This case was still on direct review as of

the date the Motion to Recall the Remittitur was filed. [1] On October 22, 2004, the Court of Appeals denied the motion to recall remittitur.

On April 24, 2005, petitioner filed a habeas corpus petition with the California Supreme Court, based on *Blakely v. Washington*. The California Supreme Court denied the petition on April 19, 2006.

On November 29, 2006, petitioner filed a federal habeas corpus petition based on *Blakely v. Washington*.

On January 22, 2007, the United States Supreme Court decided *Cunningham v California*. *Cunningham* explicitly found *Blakely* applicable to California's determinate sentencing law, holding that the court could not impose an aggravated term unless the aggravating factors were admitted by the defendant or proven beyond a reasonable doubt to a jury.

On April 10, 2007, the federal court dismissed the petition on procedural grounds unrelated to the merits of the petition. The denial was specifically without prejudice to petitioner's bringing a proceeding in the California courts based on *Cunningham v. California, supra*.

Petitioner filed a habeas corpus petition in the Court of Appeal for the Sixth District, no H031639. The Sixth District denied the petition on July 10, 2007.

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[1] Direct review includes the 90 days in which a petitioner can petition from a decision by the California Supreme Court to this court.

Petitioner then filed a habeas corpus petition with the California Supreme Court. On February 13, 2008, the California Supreme Court issued the following order:

> "The petition for writ of habeas corpus is denied without prejudice to any relief to which petitioner might be entitled after this court decides *In re Gomez*, S155425 [petition for review granted at 169 P.3d 887; 67 Cal. Rptr. 3d 465 (October 2007)]: whether a habeas corpus petitioner whose conviction became final after *Blakely v. Washington* (2004) 542 U.S. 296 but before *Cunningham v. California* (2007) 549 U.S.___, 127 S.Ct. 856, is entitled to the benefit of the high court's decision in *Blakely*."

No decision has issued in *In re Gomez*.

2. Statement of Facts

On January 21, 2003, petitioner pled guilty to one count of section 273a(a), felony child abuse, and one enhancement under section 12022.7(d) for personally inflicting great bodily injury on a child less than five years old. (Reporter's Transcript ("RT") 8.)[2] Petitioner's sentencing range under California's determinate sentencing law was 2, 4 or 6 years on the section 273a(a) charge and 4, 5, or 6 years on the section 12022.7(a) enhancement, for a total range of 6 to 12 years.

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[2] The Reporter's Transcript is the original Reporter's Transcript in petitioner's direct appeal from his conviction, which is an exhibit to his most recent habeas corpus petition filed in the California Supreme Court.

The court imposed a sentence of 10 years, imposing the midterm sentence on the section 273a(a) charge and the aggravated sentence on the section 12022.7(a) enhancement. The difference between the midterm and the aggravated term on the enhancement is one year.

The sentencing judge imposed the aggravated term on the section 12022.7(d) enhancement because it found that the victim had suffered multiple serious injuries. (RT 20). The prosecutor argued that the victim suffered "fifteen broken bones." The court apparently relied on the following sentencing factors in imposing the aggravated term on the enhancement:

> 1. The victim was a three month old baby and thus extremely vulnerable. (California Rules of Court 4.421(a)(3)).
>
> 3. The crime involved great violence. (California Rules of Court 4.421(a)(1)). (RT 19)

There is nothing in the probation report or any other part of the record (other than the sentencing transcript) stating that the victim suffered multiple serious injuries or "fifteen broken bones." (RT 13). Not only were these facts never proven before a jury or admitted by petitioner, but they were apparently never proven before the sentencing court. Petitioner, in fact, had no prior criminal record. (RT 20)

ARGUMENT

1. This petition involves important questions of law

This petition involves two important questions of law, which this Court should grant certiorari to resolve: whether this Court's decision in *Cunningham v. California* invalidating California's determinate sentencing law is retroactive to the time that this Court decided *Blakely v. Washington,* and whether California's amended determinate sentencing law, which was adopted following *Cunningham*, complies with *Cunningham's* requirements or violates the Sixth Amendment, as construed in *Cunningham*.

2. *Cunningham* is retroactive at least to the date *Blakely v. Washington* was decided.

This case was pending on direct appeal when this court decided *Blakely v. Washington.* It was no longer pending on direct appeal when this court decided *Cunningham v California.* Despite this, petitioner would be entitled to the benefits of *Cunningham* if *Cunningham* is determined to be retroactive to the time of *Blakely*.

Retroactivity depends on whether the newer decision establishes a new rule of criminal procedure. If the newer decision announces a rule that is a clear break with the past, then it is not applied retroactively. On the other hand, if the case is merely applying existing standards to new facts, then it does not establish a new rule and is applied retroactively. *United States v. Johnson,* 457 U.S. 537, 549, 102 S. Ct. 2579,

2856-2857; 73 L. Ed. 2d 202, 213, 50 U.S.L.W. 4742 (1982).

In *Johnson*, this Court explained:

"In general, the Court has not subsequently read a decision to work a 'sharp break in the web of the law,' *Milton v. Wainwright*, 407 U.S. 371, 381, n. 2 [92 S. Ct. 2174, 33 L. Ed. 2d 1] (1972) (Stewart, J., dissenting), unless that ruling caused 'such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one,' *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 498 [88 S. Ct. 2224, 20 L. Ed. 2d 1231] (1968). Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, see, e. g., *Desist v. United States*, 394 U.S. 244 [, 89 S. Ct. 1030, 22 L. Ed. 2d 248] (1969); *Williams v. United States*, 401 U.S. 646 [, 91 S. Ct. 1148, 28 L. Ed. 2d 388] (1971), or disapproves a practice this Court arguably has sanctioned in prior cases, see, e. g., *Gosa v. Mayden*, 413 U.S. [665] at 673 [, 93 S. Ct. 2926, 37 L. Ed. 2d 873 (1973) (plurality opinion); *Adams v. Illinois*, 405 U.S., [278] at 283 [, 92 S. Ct. 916, 31 L. Ed. 2d 202 (1972)]; *Johnson v. New Jersey*, 384 U.S. [719] at 731, [86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966)] or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. See, e. g., *Gosa v. Mayden*, 413 U.S., at 673 (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed for many decades"); *Stovall v. Denno*, 388

U.S., [293] at 299-300, [87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).] See also *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 [, 92 S. Ct. 349, 30 L. Ed. 2d 296] (1971); *Cipriano v. City of Houma*, 395 U.S. 701 [, 89 S. Ct. 1897; 23 L. Ed. 2d 647] (1969); *Milton v. Wainwright*, 407 U.S., at 381-382, n. 2 (Stewart, J., dissenting) ('sharp break' occurs when 'decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon'.)"

United States v. Johnson, 457 U.S. at 551-552, 102 S. Ct. at 2588, 73 L. Ed. 2d at 215. Accord, *Yates v. Aiken*, 484 U.S. 211, 108 S. Ct. 534, 98 L. Ed. 2d 546; 56 U.S.L.W. 4065 (1988) (holding *Francis v Franklin,* 471 U.S. 307, 105 S Ct 1965, 85 L Ed 2d 344, 53 U.S.L.W. 4495(1985) retroactive to the date *Sandstrom v Montana,* 442 U.S. 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979) was decided. *Sandstrom* held that a jury instruction creating a mandatory presumption shifting the burden of proof from the prosecution to the defense was unconstitutional. *Francis* did the same for a rebuttable presumption. This Court held that *Francis* "merely applied the principles" set forth in *Sandstrom*.)

Following the principles set forth in *Johnson* and *Yates, Cunningham* should be retroactive at least as far back as June 24, 2004, the date *Blakely* was decided, since *Cunningham* held that *Blakely* was applicable to California's determinate sentencing law. The facts and holding of the two cases are very similar. Both *Blakely* and *Cunningham* were found guilty by jury and were subject to a prescribed penalty, but in both cases, the trial court imposed additional time based on factors not found by the jury nor admitted by the defendant. *Cunningham*

further discusses the similarities:

> "The State in *Blakely* had endeavored to distinguish *Apprendi [v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435, 68 U.S.L.W. 4576 (2000)] on the ground that 'under the Washington guidelines, an exceptional sentence is within the court's discretion as a result of a guilty verdict.' ... We rejected that argument. The judge could not have sentenced *Blakely* above the standard range without finding the additional fact of deliberate cruelty. Consequently, that fact was subject to the Sixth Amendment's jury-trial guarantee. 542 U.S., at 304-314, 124 S. Ct. 2531, 159 L. Ed. 2d 403."

Cunningham v. California, 549 U.S. 270, 127 S. Ct. at 865,166 L. Ed. 2d at 870.

This Court held that its present decision in *Cunningham* was essentially a restatement of *Blakely*:

> "Under California's DSL, an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. . . . An element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance. . . . Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. 542 U.S., at 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 ('[T]he

'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose ***solely on the basis of the facts reflected in the jury verdict or admitted by the defendant***.' (emphasis in original)). Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt. . . the DSL violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' 530 U.S., at 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435."

Cunningham v. California, 549 U.S. 270, 127 S. Ct. at 868, 166 L. Ed. 2d at 872.

"While 'that should be the end of the matter,'" this Court continued, citing *Blakely v. Washington*, 542 U.S., at 313, 124 S. Ct. 2531, 159 L. Ed. 2d 403, "in *People v. Black*, [35 Cal. 4th 1238, 29 Cal. Rptr. 3d 740, 113 P.3d 534 (2005) ("*Black I*")] the California Supreme Court held otherwise." This Court discussed the various points set forth in *Black I*, but concluded:

"The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very

inquiry *Apprendi's* 'bright-line rule' was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S. Ct. 2531, 159 L. Ed. 2d 403."

Cunningham v. California, 549 U.S. 270, 127 S. Ct. at 868-869, 166 L. Ed. 2d at 873-874.

This Court concluded:

"Contrary to the *Black* court's holding, our decisions from *Apprendi* to [*United States v.*] *Booker* [, 543 U.S. 220; 125 S. Ct. 738; 160 L. Ed. 2d 621; 73 U.S.L.W. 4056 (2005)] point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent."

Cunningham v. California, 549 U.S. 270, 127 S. Ct. at 871,166 L. Ed. 2d at 876.

The language in *Cunningham* is very similar to the language in *Francis v. Franklin* applying the previously announced rule in *Sandstrom v. Montana:*

". . . . our decision in *Francis* was merely an application of the principle that governed our decision in *Sandstrom v. Montana*, which had been decided before petitioner's trial took place. We explicitly so held in *Francis* itself:

'The question before the Court in this case is almost

> identical to that before the Court in *Sandstrom*: whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in [*In re*] *Winship* [, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)] on the critical question of . . . state of mind,' 442 U.S., at 521, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense." 471 U.S., at 313.
>
> *Sandstrom v. Montana* made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution. 442 U.S., at 521. Today we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore affirmed.' Id., at 326-327."

Yates v. Aiken, 484 U.S. at 217, 108 S. Ct. at 538, 98 L. Ed. 2d at 554.

While clearly stating that *Cunningham* is not a new rule but merely an application of *Blakely* to California's DSL, and that *Black I* simply misapplied *Blakely*, this Court's conclusion goes further. It suggests that *Cunningham* should be retroactive to the date *Apprendi v. New Jersey* was decided (June 26, 2000.) Although this court need not go that far here,

it should note that both *Cunningham* and *Blakely* rely on the holding in *Apprendi*, indicating that they are not announcing a new rule. The facts and holding in *Cunningham* (defendant convicted by jury and sentenced by judge to upper term found to be unconstitutional) parallel those in *Apprendi*.

In any case, this Court's language in *Cunningham* that *Blakely* should have been "the end of the matter" as far as California's DSL was concerned, but that the California Supreme Court insisted on following a "reasonableness" analysis that had already been rejected in *Blakely* in favor of a "bright line rule", strongly indicates that this Court would find *Cunningham* retroactive to the time *Blakely* was decided under principles set forth in *Johnson v. United States* and *Yates v. Aiken*.

3. California's amended determinate sentencing law does not comply with *Cunningham / Blakely* and accordingly still violates the Sixth Amendment's requirement that all facts necessary to imposing aggravated terms be found by the jury or admitted by the defendant.

The California Supreme Court did not determine that *Blakely* was retroactive and hence did not remand petitioner's case for resentencing under its amended determinate sentencing law. Even if it had done so, however, the amended determinate sentencing law does not comply with Cunningham and thus still violates the Sixth Amendment's requirement that all facts necessary to imposing aggravated terms be found by the jury or admitted by the defendant.

In 2007, the California Legislature amended California Penal Code section 1170, subdivisions (a)(3), and (b), to give the sentencing court discretion to award one of the three sentencing choices in the determinate sentencing range, with no presumption of the middle term. In *People v. Sandoval,* 41 Cal. 4th 825, 161 P.3d 1146; 62 Cal. Rptr. 3d 588 (2007), the California Supreme Court added a court created remedy for defendants sentenced before the Legislature amended section 1170 that was essentially the same as the Legislative amendment, that on remand, the sentencing court would resentence as a matter of discretion and could consider any fact that it relied on before.

The new sentencing scheme still violates the Sixth Amendment as construed by this Court in *Blakely v.*

Washington and *Cunningham v. California*, since there is essentially no change except to eliminate the presumption of the midterm. As this Court pointed out in *Cunningham*:

> "California's DSL does not resemble the advisory system the *Booker* Court had in view. Under California's system, judges are not free to exercise their 'discretion to select a specific sentence within a defined range.' *Booker*, 543 U.S. at 233, 125 S. Ct. 738, 160 L. Ed. 2d 621. California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. His instruction was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years."

Cunningham v. California, 549 U.S. 270, 127 S. Ct. at 870, 871, 166 L. Ed. 2d at 875. Under California's revised determinate sentencing law, the sentencing court may still only choose between a mitigated term, mid-term, and aggravated term for any particular offense. The California Rules of Court still set forth the permissible bases for trial courts to impose aggravated terms and consecutive sentences, so the "reasons" sentencing courts will be considering are the same they considered before, those set forth in the California Rules of Court.

As this Court further held in *Cunningham*, the California Supreme Court could not avoid the Sixth Amendment by simply providing for review on a "reasonableness" basis, as it attempted to do in *Black I*:

"The *Black* court attempted to rescue the DSL's judicial fact-finding authority by typing it simply a reasonableness constraint, equivalent to the constraint operative in the federal system post-*Booker*... Reasonableness, however, is not, as the *Black* court would have it, the touchstone of Sixth Amendment analysis. The reasonableness requirement *Booker* anticipated for the federal system operates within the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints. Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable. *Booker's* remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless."

Cunningham v. California, 549 U.S. 270, 127 S. Ct. at 870, 166 L. Ed. 2d at 875-876.

Cunningham v. California authorized a sentencing system that permits judges genuinely "to exercise broad discretion within a statutory range"

"Other States have chosen to permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal. *Booker*, 543 U.S., at 233, 125 S. Ct. 738, 160 L. Ed. 2d 621. California may follow the paths taken by its sister States or otherwise alter its system,

so long as the State observes Sixth Amendment limitations declared in this Court's decisions."

Cunningham v. California, 549 U.S. 270, 127 S. Ct. at 871, 166 L. Ed. 2d at 876-877. But California's amended determinate sentencing law is not such a system. [3]

In essence, California has done what this Court said that it could not do – simply kept the existing sentencing system (minus any presumption of the midterm) and substituted reasonableness review for the requirements of the Sixth Amendment.

CONCLUSION

For the above reasons, this honorable Court should grant certiorari in this case.

Dated: Oakland, California, Wednesday, April 30, 2008.

Robert J. Beles Paul McCarthy

Robert Joseph. Beles Paul Gilruth McCarthy

Attorneys for *Petitioner ALFONSO FARQUHARSON*

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[3] The sentencing court exercised similar "discretion" under the determinate sentencing law disapproved in *Cunningham v. California*. See Court of Appeal opinion in the original appeal, citing *People v. Scott* (1994) 9 Cal.4th 331, 353,885 P.2d 1040, 36 Cal. Rptr. 2d 627 App-3 to App-5 referring to the imposition of the aggravated term as an exercise of "discretion" that the trial court did not "abuse."

APPENDIX

FILED
APR 23 2004
Court of Appeal
Sixth App Dist.
by _____deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, vs. ALPHONSO FARQUHARSON, Defendant and Appellant.	H025921 (Santa Clara County Super. Ct. No. EE30017I)

Defendant Alfonso Farquharson appeals from a judgment following a plea of guilty to felony child abuse. Defendant asserts the trial court erred in imposing a midtem sentence for a violation of Penal Code 273a, subdivision (a), [1] and an

[1] All further statutory references are to the Penal Code unless otherwise noted

aggravated term for the enhancement pursuant to section 12022.7, subdivision (d). For the reasons set forth below, we affirm the judgment.

STATEMENT OF THE FACTS AND CASE

On December 30, 2002, the defendant's baby daughter was taken to Stanford Children's Hospital because she had lost consciousness. Doctors who examined her determined that she had injuries consistent with child abuse. The baby had multiple fractures all over her body, which were in various stages of healing, indicating they had been inflicted at different times. The baby also had symptoms of " 'Shaken Baby Syndrome,' " including bruises all over her body, hemorrhages in her retina and possible bruising and trauma to her brain.

In January 2003, defendant went to the Sunnyvale Police Department and admitted that he caused injuries to his three-month-old daughter. Defendant told the police he often became frustrated with the baby because she cried whenever he held her. On some occasions he shook her and squeezed her hard and told her to shut up. Defendant would squeeze her ribs, hands and feet. On one occasion, defendant slammed the baby into her ear seat feet first. Defendant told the police that on December 30, 2002, he took the baby into an area of the room where his wife could not see him, and shook the baby violently to make her stop crying.

Defendant was charged with one count of felony child abuse (§ 273a, subd. (a)), and an enhancement for personally inflicting great bodily injury upon a child under the age of five (§§ 1203, subd. (e)(3), 12022.7, subd. (d)). Defendant pleaded

guilty as charged, and was sentenced to the mid-term for felony child abuse, and the aggravated term for the enhancement, for a total of 10 years in state prison. This appeal follows. [2]

DISCUSSION

Defendant asserts the trial court erred in imposing the mid-term on the felony child abuse charge, and the aggravated term on the enhancement. However, defendant failed to object to the imposition of these terms when he was sentenced. As a result, defendant's claims of error are waived on appeal. (*People v. Scott* (1994) 9 Cal. 4th 331, 353.)

The California Supreme Court has concluded that the waiver doctrine applies "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*People v. Scott, supra*, 9 Cal. 4th at p.

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[2] Defendant filed his first notice of appeal on April 18, 2003, stating he was appealing "from his sentence." On April 22, 2003, the superior court clerk notified defendant that his notice of appeal was inoperative due to his failure to comply with ,California Rules of Court, rule 31(d). On April 28, 2003, defendant filed an amended notice of appeal in accordance with California Rules of Court, rule 31(d). In its response brief, the Attorney General asserts the appeal should be dismissed as untimely, because the operative notice of appeal was not filed within 60 days of the entry of judgment. (In re Chavez (2003) 30 Cal.4th 643, 650.) However, an important distinction between Chavez and the present case is that here, defendant did file his original notice of appeal within the 60 day period. The original notice was technically insufficient, in that it stated the appeal was from defendant's sentence, rather than based on defendant's sentence. When defendant learned of the problem, he quickly rectified it by filing an amended notice in compliance with California Rules of Court, rule 31(d). This situation is markedly different from Chavez, where the statement of reasonable grounds for the appeal was filed after the 60-day period in the first instance. As a result, we reject the Attorney General's request to dismiss the appeal as untimely.

353.) "In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law were imposed in a procedurally or factually flawed manner." (Id. at p. 354.) .."[C]omplaints about the manner in which the trial court exercises its sentencing,: discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (Id. at p. 356.) By not objecting at the time of sentencing. defendant waived any nonconstitutional claim that the court improperly exercised its 'discretion in imposing the mid-term on the underlying charge and the upper term for the enhancement (Se *People v. Scott, supra*, 9 Cal. 4th at P. 353; cf. *United States v. Pool* (5th Cir. 1981) 660 F.2d 547, 554-556; cf. also *People v. Williams* (1998) 61 Cal.App.4th 649, 655-656.) Additionally, even in the event defendant did not waive the issue on appeal, defendant is incorrect that the court relied on improper aggravating factors and overlooked mitigating factors in imposing the mid-term of four years for felony child abuse. The court did not rely on defendant's role as the victim's caretaker as an aggravating factor; rather, the court considered the fact that the baby was of tender years and was particularly vulnerable. (Cal. Rules of Court, rule 4.421(a)(3)). As a result, the court did not impermissibly make dual use of the defendant's status as caretaker of the victim as an aggravating factor in imposing the mid-term for the felony child abuse. Moreover, the prohibition against duel (sic) use applies only when the court imposes the aggravated term, not the mid-term, as the court imposed in this case. (Cal. Rules of Court, rule 4.420(d); § 1170, subd. (b)).

In addition, the trial court did not abuse its discretion in imposing the aggravated term for the enhancement. In its statement regarding the imposition of the aggravated term for

the enhancement, the trial court was clear that it was imposing the tern because of the extensive number of injuries to the victim and the fact that defendant abused the victim multiple times. These factors go beyond the nature of the victim's injuries, and were properly considered by the trial court in imposing the aggravated term.

Finally, defendant's contention that the court should have considered his early admission of guilt a mitigating factor is without merit. A trial court has the discretion to minimize or disregard a mitigating factor if there is not a sound basis for defendant's claim. (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813.) Although defendant did admit to the police that he abused the victim, and entered an early plea of guilt, this was only after defendant had numerous opportunities to do so, and failed to act. After the victim was injured and lost consciousness, defendant was reluctant to take her to the hospital for treatment. At the hospital, defendant lied to police about what happened to the victim. Defendant did not tell the police that he abused his daughter until two weeks ad passed, and his wife was arrested for child abuse and his daughter was taken away from him. The trial court acted well within its discretion in minimizing or disregarding this factor and determining defendant's sentence.

By not objecting at the time he was sentenced, defendant waived his challenge to the trial court's discretionary sentencing choices. Moreover, even considering defendant's: claims of error on the merits, his assertions fail. The trial court did not abuse its discretion in sentencing defendant to the mid-term on the felony child abuse charge, and the aggravated term for the enhancement.

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

People v. Farquharson H025921

Court of Appeal, Sixth Appellate District - No. HO25921

S125278

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ALFONSO FARQUHARSON, Defendant and Appellant

Petition for review DENIED.

SUPREME COURT
FILED
JUL 14 2004
Frederick K. Olrich Clerk
Deputy

GEORGE

Chief Justice

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
ALPHONSO FARQUHARSON,
Defendant and Appellant.

H025921
Santa Clara County No.
EE300171

FILED
OCT 22 2004
Court of Appeal Sixth App Dist.
by _____deputy

BY THE COURT:

Appellant's motion to recall the remittitur issued on July 21, 2004, is denied. (Rushing, P.J., Premo, J., and Elia, J., participated in this decision)

Date: OCT 22 2004 RUSHING, P.J.

S134137

IN THE SUPREME COURT OF CALIFORNIA

En Banc

FARQUHARSON (ALFONSO) ON H.C.

Petition for writ of habeas corpus DENIED.

SUPREME COURT
FILED
APR 19 2006
Frederick K. Olrich Clerk
Deputy

GEORGE

Chief Justice

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALFONSO FARQUHARSON, Petitioner, vs. DERRAL G. ADAMS, Warden, Respondent.	No. C 06-07338 WHA ORDER GRANTING MOTION TO DISMISS HABEAS CORPUS PETITION AS UNTIMELY

INTRODUCTION

In this habeas corpus action, respondent Derral Adams moves to dismiss the petition as untimely. For the below-stated reasons, respondent's motion is GRANTED.

STATEMENT

In January 2003, petitioner Alfonso Farquharson pleaded guilty in California state court to felony child abuse plus an enhancement for personally inflicting great bodily injury upon a child under the age of five. On February 20, 2003, the trial court sentenced petitioner to ten years in prison.

Petitioner appealed his sentence to the California Court of Appeal, which affirmed on April 23, 2004. Petitioner petitioned

for review in the California Supreme Court on June 3, 2004. That court denied the petition for review on July 14, 2004. The remittitur issued on July 21, 2004.

On October 12, 2004, petitioner filed a motion to recall the remittitur based on the United States Supreme Court's June 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004). On October 22, 2004, the California Court of Appeal denied the motion.

On May 24, 2005, petitioner filed a petition for writ of habeas corpus with the California Supreme Court. That court denied review on April 19, 2006. The instant federal petition was filed on November 29, 2006 (Pet. at 1–2; Br. Exh. 1; Opp. Exh. A).

Finding that petitioner had stated valid claims, this Court issued an order to show cause directing respondent to answer the petition. Respondent has not filed an answer and instead has filed the instant motion to dismiss the petition for untimeliness.

ANALYSIS

Under the Antiterrorism and Effective Death Penalty Act of 1996, petitioner had one year from the date his state judgment "became final by the conclusion of direct review or the expiration of the time for seeking such review" to file a petition for writ of habeas corpus. 28 U.S.C. 2244(d)(1)(A). The Ninth Circuit has held that under AEDPA, "a judgment becomes 'final' in one of two ways — either by the conclusion of direct review by the highest court, including the United

States Supreme Court, to review the judgment, or by the expiration of the time to seek such review, again from the highest court from which such direct review could be sought." *Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001). The Ninth Circuit has further explained that "when a petitioner fails to seek a writ of certiorari from the United States Supreme Court, the AEDPA's one-year limitations period begins to run on the date the ninety-day period defined by Supreme Court Rule 13 expires." *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). Supreme Court Rule 13. 1, in turn, provides that "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."

For purposes of the instant motion, it is also necessary to remember that the one-year filing deadline may be tolled for certain periods. Specifically, AEDPA provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. 2244(d)(2).

In this case, the California Supreme Court denied the petition for review on direct appeal on July 14, 2004. On July 15, petitioner's 90-day clock began to run for filing a petition for certiorari with the United States Supreme Court. The 90th day of that period was October 12, 2004. Petitioner did not file a petition for writ of certiorari with the Supreme Court. Instead, he filed a motion to recall the remittitur on October 12. That motion was denied ten days later on October 22.

Had petitioner not filed his motion to recall the remittitur, the one-year limitation period in this case would have begun on October 13, 2004, the 91 st day after the California Supreme Court denied the petition for review on petitioner's direct appeal.[1] The parties agree, however, that the time during the pendency of the motion to recall the remittitur should not be counted toward the one-year period (Br. 2; Opp. 3). Thus the period between October 12 and October 22 will not be counted.

The parties also agree that the statute should be tolled for another 330 days between May 24, 2005, and April 19, 2006, while petitioner's state habeas corpus petition was pending before the California Supreme Court. This period is appropriately tolled under 28 U.S.C. 2244(d)(2).

The key point of contention revolves around the motion to recall the remittitur. Whether to toll any period beginning October 23, 2004, the day after the motion was denied, is the main issue this order resolves. Petitioner offers two reasons why the period beginning October 23 should not be counted toward AEDPA's one-year limitation. First, he contends that the motion to recall the remittitur was a continuation of the direct appeal. Thus, according to petitioner, following denial of the motion on October 22, 2004, he had another 90 days (over and above the first 90 days) to file a petition for certiorari.

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[1]1 Respondent incorrectly argues that the period should have started on October 12. See *Brambles v. Duncan*, 412 F.3d 1066, 1069 (9th Cir. 2005) ("Brambles's conviction became final on December 1, 1998, ninety days after the California Supreme Court denied his petition for direct review. Because the one-year limitations period began to run on the next day, and no period of statutory tolling intervened, Brambles's federal habeas petition would have been untimely if filed after December 1, 1999.") (citation omitted) (emphasis added).

Under petitioner's theory, this 90-day period would not have counted toward the one-year limitation. Second, petitioner contends that the motion to recall the remittitur was equivalent to a habeas corpus petition. Thus, he argues that the period between the denial of the first collateral attack on October 22 and the initiation of the second collateral attack on May 24, 2005, is eligible for "gap" or "interval" tolling.

Petitioner's first theory lacks merit. "In California procedure, a remittitur is analogous to the mandate in federal appellate practice." *Morales v. City of Los Angeles*, 214 F.3d 1151, 1155 n.3 (9th Cir. 2000) (citing *Rare Coin Galleries, Inc., v. A-Mark Coin Co.*, 248 Cal. Rptr. 341, 344 (1988)). The Ninth Circuit has recognized:

An application to recall the remittitur is a unique California post-conviction remedy whereby the petitioner asks the Court of Appeal or Supreme Court to reassert its jurisdiction over a case after it has relinquished that jurisdiction by issuing a remittitur following the final determination of the appeal. Though traditionally the use of an application to recall the remittitur has been limited, its scope has been so broadened in recent years that the motion to recall serves functions similar to those of certiorari and habeas corpus in the field of post-conviction review. *Hayward v. Stone*, 496 F.2d 844, 845 (9th Cir. 1974) (citations and quotations omitted). Under this definition, a motion to recall a remittitur is only a request to reassert jurisdiction where none lies at the time the motion is made. The motion to recall the remittitur in this case thus cannot be considered part of petitioner's direct appeal. The California Court of Appeal denied petitioner's motion to recall the remittitur, thereby refusing to reopen the already-closed

case.

Additionally, petitioner cites to no decision supporting his argument that the denial of the motion to recall the remittitur would "restart the clock" for a defendant to petition for a writ of certiorari before the United States Supreme Court. Under this theory, a defendant could toll the one-year period indefinitely by filing motions to recall the remittitur every 90 days. Moreover, in this case, petitioner filed his motion before — and the motion was denied by — the California Court of Appeal. He did not appeal the denial of the motion to recall the remittitur in the California Supreme Court. A petition for certiorari can only be sought after the denial of review by the state "court of last resort." Sup. Ct. R. 13.1. Thus the potential remedy through a Supreme Court writ of certiorari was unavailable to petitioner. This order holds that the motion to recall the remittitur was not a continuation of the direct appeal that gave petitioner another 90-day period for filing a petition for writ of certiorari.

Petitioner's second theory also lacks merit. According to petitioner, if the motion to recall the remittitur was essentially a habeas corpus petition, then he is entitled to toll the period between the denial of the motion in October 2004 and the filing of his next habeas corpus petition in May 2005. Under this theory it is necessary to assume that the motion to recall the remittitur was a collateral attack on petitioner's conviction and sentence. [2]

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[2] This assumption is not unreasonable, as it has been recognized: "An error of law does not authorize the recall of a remittitur. An exception is made, however, when the error is of such dimensions as to entitle the defendant to a writ of habeas corpus, in which case the remedy of recall of the

The principle of "gap" or "interval" tolling arises out of AEDPA's rule that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. 2244(d)(2). The Supreme Court has held that under Section 2244(d)(2), the "time that an application for state postconviction review is 'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, provided that the filing of the notice of appeal is timely under state law." *Evans v. Chavis*, 126 S. Ct. 846, 849 (2006) (citing *Carey v. Saffold*, 536 U.S. 214 (2002)). In *Chavis*, the Supreme Court considered what constituted a "timely" notice of appeal in California. The Supreme Court noted that in most states, a prisoner who seeks review of an adverse lower-court ruling must file a notice of appeal within a determinate time period, such as 30 or 60 days. California, however, requires only that the petition be filed within a "reasonable time." Examining the facts before it, the Supreme Court found that "viewing every disputed issue most favorably to Chavis, there remains a totally unexplained, hence unjustified, delay of at least six months." The Supreme Court held this to be "unreasonable":

> Six months is far longer than the "short period[s] of time," 30 to 60 days, that most States provide for filing

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remittitur is deemed an adjunct to the writ, and will be granted when appropriate to implement the defendant's right to habeas corpus." 22C Cal. Jur. 3d Criminal Law: Post-Trial Proceedings 831 (citing People v. Mutch, 4 Cal. 3d 389 (1971)); see also Hayward, 496 F.2d at 845 (noting that scope of a motion to recall the remittitur "serves functions similar to those of certiorari and habeas corpus in the field of post-conviction review").

> an appeal to the state supreme court. It is far longer than the 10-day period California gives a losing party to file a notice of appeal in the California Supreme Court. We have found no authority suggesting, nor found any convincing reason to believe, that California would consider an unjustified or unexplained 6-month filing delay "reasonable." Nor do we see how an unexplained delay of this magnitude could fall within the scope of the federal statutory word "pending" as interpreted in Saffold.

Id. at 849, 854 (citations omitted).

Here there was a gap of seven months between the denial of petitioner's motion to recall the remittitur and the filing of his habeas corpus petition before the California Supreme Court. Petitioner's brief offered no justification for this seven-month delay. After the hearing on this motion, petitioner's counsel was given a week to file a declaration setting forth detailed facts explaining the reason for the delay. Counsel did not file a declaration and instead filed a memorandum stating that "review of our records do not reveal with any certainty any extraneous reason for the delay" (Docket No. 17 at 1). The seven-month delay remains unexplained. This case thus falls squarely under — and is actually one month more extreme than — Chavis. Petitioner is not entitled to "gap" tolling for this delay of seven months. See Gaston v. Palmer, 447 F.3d 1165, 1167 (9th Cir. 2006).

***

For the foregoing reasons, this order holds that the one-year statute of limitations under AEDPA began to run on

October 13, 2004. The following periods are not counted toward the one year: (1) October 12, 2004, to October 22, 2004, and (2) May 24, 2005, to April 19, 2006. Petitioner's federal habeas petition was thus due on September 18, 2006. The instant federal habeas petition was 72 days late when it was filed on November 29, 2006.

CONCLUSION

Respondent's motion to dismiss the petition is GRANTED. In his opposition, petitioner alleges that he could "still file a motion to recall the remittitur" in California state court based on *Cunningham v. California*, 127 S. Ct. 856 (2007). This ruling is without prejudice to any motion petitioner could bring in state court.

IT IS SO ORDERED.

Dated: April 19, 2007.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FARQUHARSON on Habeas Corpus
H031639

FILED
JUL 10 2007
Court of Appeal Sixth App Dist.
by _____deputy

BY THE COURT:

The petition for writ of habeas corpus is denied (P, E, WD) (Premo, J., Elia, J., and Duffy participated in this decision)

Date: OCT 22 2004

S134137

IN THE SUPREME COURT OF CALIFORNIA

En Banc

FARQUHARSON (ALFONSO) ON H.C.

The petition for writ of habeas corpus is denied without prejudice to any relief to which petitioner might be entitled after this court decides *In re Gomez*, S155425: whether a habeas corpus petitioner whose conviction became final after *Blakely v. Washington* (2004) 542 U.S. 296 but before *Cunningham v. California* (2007) 549 U.S.___, 127 S.Ct. 856, is entitled to the benefit of the high court's decision in *Blakely*.

SUPREME COURT
FILED
FEB 13 2008
Frederick K. Olrich Clerk
Deputy

GEORGE

Chief Justice